IN THE COURT OF APPEAL OF SWAZILAND

APPEAL CASE NO.36_02

In the matter between:

BRIGHT ZONDO APPELLANT

VS

COMMISSIONER OF POLICE AND ANOTHER RESPONDENTS

CORAM LEON JP

STEYN JA

TEBBUTT JA

FOR THE APPELLANT MR. MABILA

FOR THE RESPONDENTS

Steyn JA:

This matter raises the question of the meaning to be ascribed to the provisions of the Theft of Motor Vehicle Act 1991 (Act 16 of 1991), hereinafter referred to as the Act. Its provisions have been interpreted divergently by the Chief Justice on the one hand and two of his colleagues in the High Court on the other. I will refer to the different judgments below.

The appellant had applied by way of notice of motion for an order directing the respondent to release a certain motor vehicle which the police had seized from him. The circumstances in which the vehicle, a green Golf with

registration number DUZ 181 GP, was seized and when is variously described by the parties.

The appellant alleges that the vehicle was seized by the police on the 28th of December 2001. The police allege that the vehicle was seized and detained on the 4th January 2002 in terms of the provisions of the Act. In doing so it acted after a detention order had been issued by a Magistrate in the Hhohho district on the same day. A copy of the relevant detention order was annexed to the papers.

Appellant contends that the police never exhibited any authorisation before seizing the vehicle. On enquiry, so he alleges, he was advised by the police that they were awaiting the results of tests regarding whether or not the vehicle had been stolen. Appellant also annexed a copy of an identity document of one Vusi Ephraem Nkosi from whom he alleged that he bought the vehicle. Appellant also alleged that he was unable to furnish the registration documents of the vehicle because they had been seized by the police together with the vehicle.

The police responded as follows:

1. The registration number and other numbers (engine and chassis) of the vehicle had been tampered with and the job number had been removed. An affidavit confirming these facts was annexed to the opposing affidavit.

2. The applicant was in fact not the registered owner of the vehicle. Indeed, the registration documentation referred to by the appellant as having been seized by

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the police reflects, one N.E. Mothlamme, with identity no. 5611090713081, as the registered owner.

3. The manufacturers of the vehicle, Volkswagen, South Africa, stated that according to their records the information supplied in connection with the vehicle related to a Fox 1.6 and not to a Citi Golf. An affidavit setting out this and other discrepancies was also attached to the respondent's opposing affidavit.

4. The appellant had also failed to furnish the authorities with a document of disposal as required by Section 7 of the Act. If he had been able to provide them, - may I add - or the Court, with this requisite documentation, it would have gone a long way towards supporting his claim that he had acquired the vehicle regularly.

Clearly, the matter having been brought by way of notice of motion, the averments of the respondent should be accepted for the purposes of the resolution of the dispute. Moreover, its (the Police) version is also clearly much more probable than that of the appellant.

On this evidence the court a quo, per Masuku J, quite correctly held that the appellant had "failed to produce evidence of ownership or lawful possession of this vehicle as required by Section 16(4) of the Act". The sub-section reads as follows:-

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"Any person who has evidence of ownership or lawful possession of a motor vehicle seized or detained under this Act may apply to court..." for the release of his vehicle. No such evidence had been provided by the appellant.

The court a quo also pointed to the provisions of Section 16(7) of the Act which read as follows:-

"No court shall order the release of a motor vehicle under this section to the person from whom it was seized only because the Director of Public Prosecutions has declined to prosecute that person or that person having been prosecuted has been acquitted of the offence in connection with that motor vehicle, unless the release is supported by documentary proof of ownership or lawful possession", (emphasis supplied by the court a quo).

In a carefully reasoned judgment Masuku J held that in view of the failure of the appellant to provide documentary proof of "ownership or lawful possession", his application for the release of the vehicle failed.

Mr. Mabila who appeared for the appellant, advanced an argument which was not canvassed before Masuku J. He contended that the police seized the vehicle unlawfully because the requisites for a lawful seizure as provided for by Section 16(1) were not present. It follows, so he contended, that the provisions of Section 16(4) and 16(7) were not applicable because the vehicle had not been seized "under

this Act", (Section 16(4)), or "under this Section" (Section 16(7)).

Section 16(1) reads as follows:

"16(1) any police officer may without warrant search and arrest any person found in possession of a motor vehicle if he has reasonable grounds to suspect that that person has stolen that motor vehicle or has received that motor vehicle knowing it to be stolen or has assisted in the stealing of that motor vehicle and shall seize from that person the motor vehicle and any document in relation to that vehicle".

Mr. Mabila's contention was that on the evidence available to the police at the time of the seizure of the vehicle, they did not have reasonable grounds to suspect that the appellant had stolen the vehicle or had received the vehicle knowing it to be stolen or had assisted in the stealing of the motor vehicle. Unless they were able to produce such evidence a seizure would not be authorised by the Act.

In a brief judgment delivered on the 19th of March 2002 in a case in which the Act was also in issue, Sapire CJ, after citing the provisions of Section 16(1) of the Act, said the following:

"In the present case the applicant brought his vehicle to the police station and it was there seized purportedly in terms of this section but there is nothing to show that the police had any reason to believe that the applicant stole the vehicle or that he

received it knowing it to be stolen or that he assisted in the stealing of the motor vehicle. The evidence on behalf of the respondent goes no further than to suggest that the vehicle may have been stolen. There is nothing to connect the theft or subsequent known illegal conduct on the part of the applicant. The vehicle is to be returned to the applicant forthwith".

(GULE V COMMISSIONER OF POLICE AND ANOTHER, (CIVIL TRIAL NO. 182/2002). See also the Chief Justice's judgment in TOM NDODA MDLULI V COMMISSIONER OF POLICE AND ANOTHER CIVIL CASE NO.3262/02 referred to below.

However, in GIYANI DLAMINI V COMMISSIONER OF POLICE AND ANOTHER, CIVIL CASE NO.3050/95 Maphalala J, with reliance on the presumptive provisions of Section 4(l)(a), read with Section 16(1) of the Act, held that where the police reasonably suspected that the vehicle found in a person's possession had been stolen, they were entitled to seize it in terms of the provisions of the Act.

In the Mdluli case the learned Chief Justice said the following concerning a reliance on Section 4(1)(a):

"For the respondents in arguing the case, I was referred to the presumption in Section 4 of the Act. This Section however only comes into operation once there is a case pending and the person from whom the motor vehicle was taken is charged with the offence. That presumption cannot assist the police in having

reasonable grounds. If that were the case, everybody driving a vehicle in Swaziland with a foreign number plate is likely to have their vehicle seized and detained for any length of time".

In construing Sections 4 and 16 of the Act, the provisions of the Act must be read as a whole. Regard should also be had to the structure of the Act and the purpose the legislature had in mind as evidenced by its contents.

The Act was clearly intended by the law-maker to strengthen the hands of the authorities to deal effectively with the notorious problem of car-theft and the illegal cross-border trafficking in stolen vehicles. Many of its provisions cater for presumptions of guilt as well as the reversal of the onus of proof. See in this regard inter alia the provisions of Sections 4, 6, 7, 9, 10, 12(2), 13(2) and 16. The prescribed penalties are severe and restrictions as to access to bail are provided for, as are the forfeiture of assets derived from the theft of a motor vehicle. (See Sections 18 and 20).

A key consideration in combating these offences once a reasonable suspicion of theft exists, would be the right to seize such a vehicle for the purpose of confirming such reasonable suspicion and apprehending those who are guilty of committing the theft itself or who have in some manner participated in, or facilitated or concealed its commission.

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To construe Section 16 in isolation and not to have regard to the provisions of Section 4(1)(a) when giving a meaning to the words "reasonable grounds to suspect" would in my view be artificial and in conflict with the avowed and expressed purposes of the legislature. The section reads as follows:

"4. (1) Unless the contrary is proved by him, a person shall be presumed to have committed an offence under Section 3 and, on conviction, punished accordingly if:-

(a) he is found in possession of a motor vehicle which is reasonably suspected to be stolen;" As can be seen these provisions are unqualified and of general application. There is no room for the importation of the limitation the learned Chief Justice sought to impose on its ambit. The generality of this provision is also evidenced by the provisions of Section 4(2) which reads as follows:-

"4 (2) In any proceeding in which the accused is charged with receiving a motor vehicle knowing it to be stolen, the onus shall be on the accused to prove that at the time he received the motor vehicle he had no reasonable grounds to believe that the vehicle was stolen".

On the reasoning of the Chief Justice, this section would have been redundant.

My view is that a police officer, once he has reasonable grounds to suspect a vehicle has been stolen, can have regard to the fact that in such circumstances the law

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presumes that the person found in possession either stole the vehicle or received it knowing it to be stolen. In these premises, he may either arrest the person, or seize the vehicle pending the determination of whether the guilt of the possessor can be proven.

I emphasize, however, that it must be established that "reasonable grounds to suspect" are in fact present. In the present case this was clearly proved on the facts deposed to on behalf of the respondent. There can be little doubt that the vehicle was in fact a stolen vehicle and that the

appellant's right to possess the vehicle lawfully was seriously tainted. The vehicle was therefore lawfully seized and the appellant clearly failed to provide documentary proof of ownership or lawful possession.

In my view the court a quo was right to dismiss the application. The appeal is accordingly dismissed with costs.

DELIVERED IN OPEN COURT ON THIS 22nd NOVEMBER 2002

J.H. STEYN

Judge of Appeal

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I agree

R.N. LEON

Judge President

I agree

P.H. TEBBUTT

Judge of Appeal